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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LARRY G. MALLORY,
Booking No. 12527706,

Plaintiff,

vs.

COMMISSARY STORE at GBDF;
GEORGE BAILEY JAIL; and
CATHERINE FEHAY, Religious
Coordinator,

Defendants.

Civil No. 14-CV-1111 BEN (DHB)

ORDER:

**(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED
IN FORMA PAUPERIS AND
GARNISHING BALANCE FROM
INMATE'S TRUST ACCOUNT
PURSUANT TO 28 U.S.C. § 1915(a)
[ECF Doc. No. 2]**

AND

**(2) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING TO
STATE A CLAIM PURSUANT
TO 28 U.S.C. § 1915(e)(2)(B)(i)
AND 28 U.S.C. § 1915A(b)(1)**

Larry G. Mallory ("Plaintiff"), a state prisoner currently serving his sentence at the San Diego County Sheriff's Department George Bailey Detention Facility ("GBDF"), in San Diego, has filed a civil rights complaint ("Compl.") pursuant to 42 U.S.C. § 1983 (Doc. No. 1). Plaintiff claims the GBDF, its commissary, and a religious coordinator at GBDF have denied his First and Eighth Amendment rights by failing to provide him kosher hygiene products. *See* Compl. at 3, 4. He seeks injunctive relief preventing

1 Defendants from taking “any reprisals against [him],” and \$4 million in general and
 2 punitive damages. *Id.* at 7.

3 Plaintiff did not prepay the filing fee required to commence a civil action pursuant
 4 to 28 U.S.C. § 1914(a) at the time he filed suit; instead he filed a Motion to Proceed In
 5 Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF Doc. No. 2).

6 **I. MOTION TO PROCEED IFP**

7 All parties instituting any civil action, suit, or proceeding in a district court of the
 8 United States, except an application for writ of habeas corpus, must pay a filing fee of
 9 \$400.¹ *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to
 10 prepay the entire fee only if he or she is granted leave to proceed IFP pursuant to 28
 11 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).
 12 However, pursuant to the Prison Litigation Reform Act (“PLRA”), if the plaintiff is a
 13 prisoner and leave to proceed IFP is granted, he or she is permitted to proceed without
 14 prepayment of the full fee, but nevertheless remains obligated to pay the entire fee in
 15 installments, regardless of whether the underlying civil action is dismissed for other
 16 reasons. *See* 28 U.S.C. § 1915(b)(1) & (2).

17 The Court finds that Plaintiff has submitted an affidavit which complies with 28
 18 U.S.C. § 1915(a)(1), and that he has attached a certified prison certificate documenting
 19 his account activity at GBDF for the six-month period preceding the filing of his
 20 Complaint pursuant to 28 U.S.C. § 1915(a)(2) and CivLR 3.2. Plaintiff’s trust account
 21 certificate indicates he has had an average monthly balance of \$0.14, and average
 22 monthly deposits of \$50.58, but only \$0.82 in available funds in his account at the time
 23 his Complaint was filed. From this accounting, the Court finds Plaintiff has insufficient
 24 available funds from which to pay any initial partial filing fee. *See* 28 U.S.C.
 25 § 1915(b)(4).

26
 27 ¹ In addition to the \$350 statutory fee, all parties filing civil actions on or after
 28 May 1, 2013 must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a)
 (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule) (eff. May 1,
 2013). However, the additional \$50 administrative fee is waived if the plaintiff is
 granted leave to proceed IFP. *Id.*

1 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP (ECF Doc. No.
 2 2) and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the
 3 entire \$350 balance of the filing fee owed must be collected and forwarded to the Clerk
 4 of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
 5 § 1915(b)(1).

6 **II. SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2) AND § 1915A(b)**

7 **A. Standard**

8 The PLRA also requires that the Court review complaints filed by all persons
 9 proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any
 10 facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of
 11 criminal law or the terms or conditions of parole, probation, pretrial release, or
 12 diversionary program," "as soon as practicable after docketing." *See* 28 U.S.C.
 13 §§ 1915(e)(2) and 1915A(b). Under these statutes, the Court must sua sponte dismiss
 14 complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim,
 15 or which seek damages from defendants who are immune. *See* 28 U.S.C.
 16 §§ 1915(e)(2)(B) and 1915A; *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010)
 17 (discussing 28 U.S.C. § 1915A(b)); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir.
 18 2000) (en banc) (discussing 28 U.S.C. § 1915(e)(2)).

19 Every complaint must contain "a short and plain statement of the claim showing
 20 that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
 21 are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported
 22 by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 23 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "When there
 24 are well-pleaded factual allegations, a court should assume their veracity, and then
 25 determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.
 26 "Determining whether a complaint states a plausible claim for relief [is] ... a context-
 27 specific task that requires the reviewing court to draw on its judicial experience and
 28 common sense." *Id.* The "mere possibility of misconduct" falls short of meeting this

1 plausibility standard. *Id.*; see also *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.
2 2009).

3 While a plaintiff's factual allegations are taken as true, courts "are not required to
4 indulge unwarranted inferences." *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th
5 Cir. 2009) (internal quotation marks and citation omitted). Indeed, while courts "have
6 an obligation where the petitioner is pro se, particularly in civil rights cases, to construe
7 the pleadings liberally and to afford the petitioner the benefit of any doubt," *Hebbe v.*
8 *Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026,
9 1027 n.1 (9th Cir. 1985)), it may not "supply essential elements of claims that were not
10 initially pled." *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268
11 (9th Cir. 1982). Even before *Iqbal*, "[v]ague and conclusory allegations of official
12 participation in civil rights violations" were not "sufficient to withstand a motion to
13 dismiss." *Id.*

14 **B. Defendants George Bailey Jail and Commissary Store**

15 As an initial matter, the Court finds Plaintiff's Complaint requires sua sponte
16 dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B)(1) and § 1915A(b)(1) to the extent it
17 seeks relief under § 1983 against the "George Bailey Jail" and the "Commissary Store
18 at GBDF." See Compl. at 1, 2.

19 "To state a claim under 42 U.S.C. § 1983, the plaintiff must allege two elements:
20 (1) that a right secured by the Constitution or laws of the United States was violated; and
21 (2) that the alleged violation was committed by a person acting under color of state law."
22 *Campbell v. Washington Dep't of Soc. Servs.*, 671 F.3d 837, 842 n.5 (9th Cir. 2011)
23 (citing *Ketchum v. Alameda Cnty.*, 811 F.2d 1243, 1245 (9th Cir. 1987).

24 Thus, even if Plaintiff's Complaint pleaded facts sufficient to support either a First
25 or Eighth Amendment violation related to his access to kosher hygiene products, see
26 Compl. at 3-4, neither a local law enforcement agency (like the San Diego County
27 Sheriff's Department, which operates GBDF), a county jail or detention facility (like
28 GBDF), or a department or division within such a facility (like the "Commissary Store")

1 are proper defendants under § 1983. *See Vance v. Cnty. of Santa Clara*, 928 F. Supp.
 2 993, 996 (N.D. Cal. 1996) (“Naming a municipal department as a defendant is not an
 3 appropriate means of pleading a § 1983 action against a municipality.”) (citation
 4 omitted); *Powell v. Cook Cnty. Jail*, 814 F. Supp. 757, 758 (N.D. Ill. 1993) (“Section
 5 1983 imposes liability on any ‘person’ who violates someone’s constitutional rights
 6 ‘under color of law.’ Cook County Jail is not a ‘person.’”).

7 For these reasons, Plaintiff’s Complaint fails to state a claim upon which § 1983
 8 relief can be granted against either Defendants George Bailey Jail or the Commissary
 9 Store at GBDF and any purported claims against these parties must be **DISMISSED**
 10 pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1).

11 C. Vicarious Liability

12 As to the only individual “person” named as a Defendant, Catherine Fehay,
 13 Plaintiff describes her as the “County Jails Religious Coordinator” and claims she is
 14 therefore “aware [that] the kosher inmate religious agreements contract does not permit
 15 [him] to purchase any type of hygenic cosmetics,” and that “no kosher based products
 16 are provided at the County Jails.” *See Compl.* at 2.

17 “Because vicarious liability is inapplicable to . . . § 1983 suits,” Plaintiff “must
 18 plead that each Government-official defendant, through the official’s own individual
 19 actions, has violated the Constitution.” *Iqbal*, 556 U.S. at 676. Plaintiff’s Complaint,
 20 however, contains no further “factual enhancement” to describe what Fehay did, or failed
 21 to do, with regard to his need for kosher hygiene or cosmetic products which caused a
 22 violation of either his First or Eighth Amendment rights. *See Estate of Brooks v. United*
 23 *States*, 197 F.3d 1245, 1248 (9th Cir. 1999) (“Causation is, of course, a required element
 24 of a § 1983 claim.”). “The inquiry into causation must be individualized and focus on
 25 the duties and responsibilities of each individual defendant whose acts or omissions are
 26 alleged to have caused a constitutional deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633
 27 (9th Cir. 1988) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976); *Berg v. Kincheloe*,
 28 794 F.2d 457, 460 (9th Cir. 1986)).

1 A person deprives another “of a constitutional right, within the meaning of section
 2 1983, if [s]he does an affirmative act, participates in another’s affirmative acts, or omits
 3 to perform an act which [s]he is legally required to do that causes the deprivation of
 4 which [the plaintiff complains].” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).
 5 There is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*,
 6 9 F.3d 1433, 1437-38 (9th Cir. 1993).

7 Thus, without specific “factual content” that might allow the Court to “draw the
 8 reasonable inference” that Fehay may be held personally liable for any unconstitutional
 9 conduct directed at Plaintiff, the Court finds his Complaint, as currently pleaded,
 10 contains only the type of “defendant-unlawfully-harmed-me accusations” which fail to
 11 “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 568.

12 **D. First & Eighth Amendment Claims**

13 Even if Plaintiff had included sufficient facts in his Complaint to show a basis for
 14 holding Defendant Fehay personally liable, he also fails to allege facts sufficient to
 15 support either a First or Eighth Amendment violation. *See Crater v. Galaza*, 508 F.3d
 16 1261, 1269 (9th Cir. 2007) (“In § 1983 cases, it is the *constitutional right itself* that
 17 forms the basis of the claim.”). While Plaintiff cites the First and Eighth Amendments,
 18 and bases his suit on an alleged lack of kosher hygiene or cosmetic products available
 19 to him at GBDF, *see* Compl. at 3-4, his pleading offers only “labels and conclusions,”
 20 and fails to state a plausible claim for relief under either of the constitutional
 21 amendments he invokes. *Iqbal*, 556 U.S. at 678-79 (quoting *Twombly*, 550 U.S. at 555,
 22 556).

23 The protections of the First Amendment’s Free Exercise Clause are triggered when
 24 prison or jail officials substantially burden the practice of an inmate’s religion by
 25 preventing him from engaging in conduct which he sincerely believes is consistent with
 26 his faith. *Shakur v. Schrivo*, 514 F.3d 878, 884-85 (9th Cir. 2008) (citing *Malik v.*
 27 *Brown*, 16 F.3d 330, 333 (9th Cir. 1994)). Free exercise however, is necessarily limited
 28 by the fact of incarceration, and “may be curtailed in order to achieve legitimate

1 correctional goals or to maintain prison security.” *McElyea v. Babbitt*, 833 F.2d 196,
2 197 (9th Cir. 1987) (citing *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 347-48 (1987));
3 *see also Bell v. Wolfish*, 441 U.S. 520, 527 (1979) (“A detainee simply does not possess
4 the full range of freedoms of an unincarcerated individual.”).

5 As currently pleaded, Plaintiff’s Complaint contains no facts which show what any
6 individual person did to burden or limit the exercise of any of his sincerely held religious
7 beliefs. *See Shakur*, 514 F.3d at 884-85. Plaintiff uses the word “kosher,” but his
8 Complaint contains no additional factual content to plausibly suggest how or to what
9 extent any GBDF official put “substantial pressure on [him] to modify his behavior and
10 to violate his beliefs,” *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718
11 (1981), or forced him to “choose between following the precepts of h[is] religion and
12 forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts
13 of h[is] religion . . . on the other.” *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).
14 Finally, Plaintiff’s Complaint does not contain any allegations to show that the restriction
15 is not reasonably related to legitimate penological interests. *See Shakur*, 514 F.3d at
16 884-85 (citing *Turner v. Safely*, 482 U.S. 78, 89 (1987)).

17 In addition, to the extent Plaintiff suggests the lack of kosher hygiene products at
18 GBDF constitutes the cruel and unusual punishment proscribed by the Eighth
19 Amendment, he has failed to state a plausible claim for relief. Conditions must not
20 involve “the wanton and unnecessary infliction of pain” or be “grossly disproportionate
21 to the severity of the crime warranting imprisonment.” *Rhodes v. Chapman*, 452 U.S.
22 337, 347 (1981) [hereinafter *Chapman*]. In order to allege that a prison official violated
23 the Eighth Amendment, a prisoner must allege facts sufficient to fulfill two requirements.
24 *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

25 First, he must allege facts sufficient to show that a prison official’s acts or
26 omissions are objectively “sufficiently serious” and deprived him of the “minimal
27 civilized measure of life’s necessities.” *Farmer*, 511 U.S. at 834 (citations omitted); *see*
28 *also Chapman*, 452 U.S. at 347. While indigent inmates have the right to personal

1 hygiene supplies, such as toothbrushes and soap, Plaintiff's Complaint fails to contain
2 sufficient factual allegations to suggest that the denial of kosher supplies amounts to the
3 type of objectively serious deprivation the Cruel and Unusual Punishments Clause exists
4 to prevent. *See Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996), *amended by* 135
5 F.3d 1318 (9th Cir. 1998); *Farmer*, 511 U.S. at 834.

6 To meet the second requirement in a prison conditions case, the plaintiff must
7 show that the prison official's state of mind was of "deliberate indifference" to inmate
8 health or safety. *Farmer*, 511 U.S. at 834 (citations omitted). "[A] prison official cannot
9 be found liable under the Eighth Amendment for denying an inmate humane conditions
10 of confinement unless the official knows of and disregards an excessive risk to inmate
11 health or safety." *Id.* at 837. To meet this standard, "the official must both be aware of
12 facts from which the inference could be drawn that a substantial risk of serious harm
13 exists, and he must also draw the inference." *Id.* Plaintiff fails to allege any facts from
14 which this Court can conclude that any official had the requisite state of mind.

15 Accordingly, his Complaint fails to state an Eighth Amendment claim upon which
16 relief can be granted. *Iqbal*, 556 U.S. at 679.

17 **III. CONCLUSION AND ORDER**

18 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

19 1. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF
20 Doc. No. 2) is **GRANTED**.

21 2. The Watch Commander at GBDF, or his designee, is **DIRECTED** to collect
22 from Plaintiff's trust account the \$350 balance of the filing fee owed in this case by
23 collecting monthly payments from the account in an amount equal to twenty percent
24 (20%) of the preceding month's income and forwarding those payments to the Clerk of
25 the Court each time the amount in Plaintiff's account exceeds \$10 in accordance with 28
26 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE**
27 **NAME AND NUMBER ASSIGNED TO THIS ACTION.**

28

IT IS FURTHER ORDERED that:

DATED:  September 15, 2014

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